

APR 23 1979

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

STANLEY RODAK, JR., CLERK

No. ——— **78-1214**

PPG, Inc., a corporation
and PENELOPE P. PATRICK,

Petitioner,

vs.

PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN
OPPOSITION TO GRANTING
OF WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

The Respondent, People of the State
of California, respectfully pray that a
writ of certiorari to review the judgment
of the Appellate Department of the
Superior Court of the State of California,

for the County of Los Angeles, affirming the order of the Municipal Court of the Los Angeles District denying petitioner's pretrial motion to suppress evidence, not issue.

OPINIONS BELOW

No written or oral opinions were rendered by the Municipal Court of the Los Angeles Judicial District. The order denying the pre-trial motion to suppress was affirmed by a written decision of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on November 14, 1978. This opinion is reported at (1978) 88 Cal.App.3d, Supp. 12; __Cal.Rptr.__, and appears in Appendix A of Petitioner's writ.

JURISDICTION

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was entered November 14, 1978. A copy of the opinion appears in Appendix A

of Petitioner's writ. A timely Petition for Rehearing and Application for Transfer to the Court of Appeal was denied by operation of law on November 29, 1978, when the Appellate Department granted a Request for Publication. The Order Certifying Publication, dated November 29, 1978, appears in Appendix B of Petitioner's petition.

On December 26, 1978, the Court of Appeal of the State of California, Second Appellate District, Division Four, denied petitioners motion to transfer the case. A copy of its Memorandum declining to transfer the case appears in Appendix C of Petitioner's writ.

As a result of the prior proceedings, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code § 1471; California Rules of Court, Rules 24(a) and 28(b); Smith v. California (1959) 361 U.S. 147, 148, fn. 2; Virginia Ry. Co. v. Mullins (1925) 271 U.S. 220, 222.

QUESTION PRESENTED

Whether the failure of a magistrate to personally view an allegedly obscene film prior to issuing a search warrant violates the First, Fourth and Fourteenth Amendment Rights of the Petitioner where the affidavit in support of the warrant includes a police officer's detailed description of the film.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Penal Code § 311.2(a) provides as follows:

"Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or exhibits to others, any obscene matter, is guilty of a misdemeanor."

California Penal Code § 1538.5 provides, in part, as follows:

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

". . .

"(2) The search or seizure with a warrant was unreasonable because . . . (iii) there was not probable cause for the issuance of the warrant . . . (v) there was any other violation of federal or state constitutional standards.

". . .

"(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure.

". . .

"(j) . . . If the property or evidence seized relates solely to a

misdeemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. . . ."

The First Amendment provides, in part, as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourth Amendment provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment provides, in part, as follows:

". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF FACTS

On May 27, 1977, Los Angeles Police Officer, Robert E. Peters, assigned to the Administrative Vice Division of the Los Angeles Police Department for over five years, went to a post office box at the Hollywood Post Office which he maintained under the name of "David Allen." At his post office box he recovered an envelope addressed to David Allen which contained an unsolicited

8mm. film brochure advertising the availability of sexually explicit films. The envelope bore a return address of P.P.G., Inc., 110 Ivy Avenue, Monrovia, California. Officer Peters commenced an obscenity investigation, the details of which are outlined in the affidavit in support of the search warrant.

After receiving further advertisements and order forms, Officer Peters ordered a film entitled "Kinky Kids - 4 (Angelic Ass)." On October 26, 1977, Officer Peters went to his post office box in Los Angeles and removed a Jiffy mailer containing the 8mm. motion picture film entitled "Kinky Kids - 4 (Angelic Ass)." The film box had been addressed to David Allen and bore the return address of P.P.G., Inc. Officer Peters returned to Parker Center in Los Angeles and viewed the film. Based on his training and experience, Officer Peters formed the opinion that the film fell within the purview of Penal Code § 311(a) and that the commercial dissemination of said film violated Penal Code § 311.2.

After Officer Peters viewed the film, he wrote a description of the film, which he later included in his affidavit in support of the search warrant. Officer Peters described the film as follows:

"Film opens with street scenes of black females on various streets as viewed from a vehicle then flashes to scene of black female orally copulating a white male. Film flashes back to street scenes of white females, then back to scene of white female in white gown orally copulating a bearded male also dressed in white.

"Male enters female from rear --has intercourse. Man orally copulates the female. Man inserts one finger into anus of woman. Man inserts, two, then three, then four fingers into woman's anus, then masturbates woman with four fingers inserted in anus. Man removes his fingers from anus then licks them. Woman orally copulates man. Man enters woman from rear--has

intercourse. Man ejaculates on woman's buttocks. Man licks white substance from woman's buttocks. Film ends."

The film ran approximately 15 minutes.

The officers' continued investigation led them to a mail order business being run by Petitioners at 110 North Ivy Avenue in the City of Monrovia.

On the morning of October 31, 1977, Officer Peters went to a judge of the Municipal Court of the Los Angeles Judicial District to secure a search warrant. Officer Peters had prepared an 18-page affidavit in support of the search warrant which he submitted to the Honorable Edward L. Davenport, Judge of the Municipal Court of the Los Angeles Judicial District. Officer Peters went to see Judge Davenport at approximately 8:30 a.m. Officer Peters had with him the motion picture film which is the subject of this criminal prosecution. Officer Peters also had a projector in his car. Officer Peters offered to show the film to Judge Davenport but Judge Davenport declined.

After reviewing the affidavit and search warrant, Judge Davenport signed the search warrant. The warrant was served and a search was conducted under the supervision of Officer Peters.

On December 8, 1977, the City Attorney of the City of Los Angeles filed a complaint against P.P.G., Inc., a corporation, Penelope P. Patrick, and Wayne M. Ploesch, individually, charging them with having committed a violation of Penal Code § 311.2 (distribution of obscene matter).

On December 23, 1977, Penelope P. Patrick was arraigned in Division 82 of the Municipal Court. She appeared through counsel, entered a not guilty plea and requested a jury trial. At the same time, the arraignment of the corporation, P.P.G., Inc., was advanced from December 27, 1977, to December 23, 1977, and the corporation was arraigned.

On January 5, 1978, Petitioner filed a Notice of Motion for Ordering Suppressing and Returning Evidence with Memorandum of Points and Authorities. The motion was heard on January 30, 1978, before the Honorable Jack Newman, Judge Presiding,

in Division 50 of the Los Angeles Municipal Court. At the conclusion of the hearing, Judge Newman upheld the validity of the search warrant, noting, in part, that a magistrate need not personally view the film in making a determination as to probable cause where a sufficiently detailed description is contained in the affidavit in support of the search warrant.

Petitioner orally advised Judge Newman that they intended to appeal the decision and Judge Newman acknowledged their right to appeal and to obtain an appellate ruling prior to trial. Accordingly, the trial, then scheduled for the same day, January 30, 1978, was continued to a new date to permit the Notice of Appeal to be filed.

Notice of Appeal was filed on February 9, 1978.

On November 14, 1978 the Appellate Department of the Superior Court affirmed the order of the Municipal Court. On November 29, 1978 the Appellate Department ordered its opinion to be published.

On December 26, 1978 the Court of Appeal in a Memorandum Order determined not to transfer the case.

A trial date has not been set pending ultimate determination of this matter.

REASONS FOR DENYING THE WRIT

1. The affirmance of an order denying a pre-trial motion to suppress evidence obtained by an allegedly unlawful search and seizure is not a final judgment from which an appeal will lie prior to the determination of the criminal proceedings. J. Robert Cogen v. United States (1929) 278 U.S. 221.

The right of appeal in criminal cases is purely a creature of statute. Abney v. United States (1977) 431 U.S. 651. This court is precluded from taking this case unless the petition is from a "final judgment" within the meaning of 28 U.S.C. § 1257. "In a criminal case, the final judgment 'is of course the imposition of a sentence.'" Bateman v. Arizona (1976) 429 U.S. 1302, 1306. Clearly the pre-trial motion to suppress evidence does

not fall within the purview of 28 U.S.C. § 1257 and therefore the writ of certiorari should not issue.

2. The issuance of a search warrant by a neutral magistrate authorizing the seizure of an allegedly obscene film, where the magistrate did not personally view the film but rather relied on the detailed description of the film by a police officer did not violate the First, Fourth, and Fourteenth Amendment Rights of the Petitioner.

Despite Petitioner's claim that the search warrant was invalid because the magistrate did not view the film prior to issuing the warrant, it is clear that such a procedure is not required in order to insure due process.

The concern of the cases cited by Petitioner, including Marcus v. Search Warrant (1961) 367 U.S. 717, A Quantity of Books v. Kansas (1964) 378 U.S. 205, and Lee Art Theatre v. Virginia (1968) 392 U.S. 636, Roaden v. Kentucky (1973) 413 U.S. 496 and Heller v. New York (1973) 413 U.S. 483, is that a warrant

should not issue on the "mere conclusory allegations of an officer" and as to the obscenity of the material involved. It would appear that appropriate due process is afforded when the magistrate is instead presented with a detailed description of the materials to be seized.

California courts have consistently recognized this principle. In Monica Theater v. Municipal Court (1976) 9 Cal. App.3d 1, the court stated:

". . . we find no decisive pronouncements in the decisions of the United States Supreme Court that for probable cause purposes a magistrate, asked to issue a seizure warrant for a motion picture film, must, before issuing a warrant . . . at least view the film ex parte."

Monica Theater v. Municipal Court (1976) 9 Cal.App.3d 1.

The court in Monica Theater found that the defendants' First Amendment rights were protected despite the fact that the film had not been viewed prior to the issuance of the warrant.

The court noted:

" . . . [I]t is our feeling that an adversary proceeding and view of the film are promptly and readily obtainable after the issuance of a warrant through the medium of a section 1538.5 motion." Monica Theater v. Municipal Court supra, at page 13 (Emphasis added.)

The California Court of Appeal in People v. Haskin (1976) 55 Cal.App.3d 231, 236, dismissed a like claim as to the invalidity of the warrant in an obscene film prosecution. The court there held that:

"An examination of the affidavit for the search warrant convinces us there was probable cause for believing the films (and attached photographs) to be obscene and it was not necessary for the Magistrate to see the film."

Haskin, supra, at page 236 (Emphasis added.)

In the case of People v. Superior Court (Freeman), (1975) 14 Cal.3d 82, the California Supreme Court, in granting a motion to suppress an allegedly obscene film seized without a search warrant, intimated that had the police viewed the films and presented a sufficiently detailed affidavit to a magistrate, as was done here, a valid warrant could have issued. No mention was made of any necessity of having the magistrate view the film.

It would appear that the affiant's description of the film, supplemented by the accompanying pictorial advertisements made it unnecessary for the magistrate to view the film in order to "focus searchingly on the question of obscenity" to determine that the affidavit was legally sufficient to establish the requisite probable cause. There was no abridgment of Petitioner's constitutional rights in this case.

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny the writ.

Respectfully submitted,

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